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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1840

MERCK AND CO., INC.,

Petitioner,

v.

PAUL J. McGARVEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Merck and Co., Inc., seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 12, 1974.

OPINIONS BELOW.

The opinion of the court of appeals is not yet reported. It appears in the appendix at p. A1. Judge Garth's concurring opinion appears in the appendix at p. A3. The opinion of the district court is reported at 359 F. Supp. 525. It appears in the appendix at p. A16.

JURISDICTION.

The judgment of the court of appeals was entered on March 12, 1974, and its further order denying a petition for rehearing was entered on April 4, 1974. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where a plaintiff, in a case brought in a United States District Court, based on the Age Discrimination in Employment Act, has failed to seek relief from a state administrative agency and the District Court has held that such failure deprived that court of subject matter jurisdiction and dismissed the complaint for want of jurisdiction, may a Court of Appeals, while agreeing that the Act requires such prior application to the state agency and that non-compliance with this requirement is a defect which deprives the lower court of subject matter jurisdiction, nevertheless remand the case to the District Court with instructions that the District Court, if relief is not presently available to the plaintiff before the state agency, shall hear and determine the case on the merits?

2. May a United States Court of Appeals properly consider and accept as true in reaching its decision allegations contained in an affidavit which was not presented to or considered by the District Court, without at least giving the opposing party an opportunity to contest the alleged facts?

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

1. The Constitution of the United States, Article III, Section 1.

2. The Age Discrimination in Employment Act of 1967. Petitioner relies particularly on Sections 626(c) and (d) and 633(b).

3. Federal Rule of Civil Procedure 12(h)(3).

All are set out in the appendix, beginning at p. A21.

STATEMENT OF THE CASE.

Basis for Federal Jurisdiction in the District Court.

Petitioner's position is that the district court lacked subject matter jurisdiction. Jurisdiction was invoked by plaintiff under the federal Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 et seq. (See p. A21)

The Nature of This Action and the Proceedings Below.

The instant suit was filed in the United States District Court for the District of New Jersey on March 1, 1972, by respondent Paul J. McGarvey ("McGarvey") against petitioner Merck & Co., Inc. ("Merck"). McGarvey is an individual resident of Pennsylvania, who was formerly employed by Merck at its Research Laboratories Division in West Point, Pennsylvania. According to McGarvey's complaint, his employment with Merck was wrongfully terminated on November 13, 1970, in violation of the Age Discrimination in Employment Act of 1967,[1] 29 U. S. C. § 621 et seq. ("Age Discrimination Act"). McGarvey's complaint did not allege any attempt to contact the Pennsylvania Human Relations Commission ("Pennsylvania Commission"), a state agency authorized to grant relief for age discrimination, prior to the institution of suit.

Merck answered, denying all charges of wrong-doing and specifically denying that McGarvey was discharged or otherwise discriminated against because of his age. Merck further urged, *inter alia*, that McGarvey's failure to file

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1. At the time of his termination, McGarvey was 59 years of age. See 29 U. S. C. § 631.

a complaint with, or commence proceedings before, the Pennsylvania Commission [2] barred the action in accordance with 29 U. S. C. § 633(b), and similarly denied that the complaint stated a cause of action upon which relief could be granted. Subsequently, McGarvey moved to strike these defenses. Merck opposed this motion and moved for judgment on the pleadings in its favor.

By opinion dated April 10, 1973,[3] the district court, by Judge Clarkson S. Fisher, held that commencement of proceedings with an appropriate state agency is a jurisdictional prerequisite to a federal suit under the Age Discrimination Act (§ 633(b)), and dismissed the complaint.

One day thereafter, on April 11, 1973, McGarvey filed an affidavit [4] (hereinafter "the affidavit") asserting rather vaguely a contact between himself and the Pennsylvania Commission "in February 1971" and certain other later conversations with, *inter alia*, employees of the U. S. Department of Labor. The affidavit failed to specify either the date of the asserted conversation with the Pennsylvania Commission, the precise content of such communication, or the party with whom McGarvey assertedly spoke. It was similarly vague concerning any conversations with employees of the Department of Labor. According to the affidavit.

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2. McGarvey subsequently conceded that

"Plaintiff did not file a Complaint with the Pennsylvania Human Relations Commission at anytime before or after filing suit in Federal Court."

Brief in Support of Plaintiff's Motion to Strike Defendant's Third Defense, filed January 12, 1973 at page 1.

3. This opinion was filed on April 11, 1973, and the order dismissing the complaint was entered by the clerk on April 12, 1973.

4. The affidavit was accompanied by a letter dated April 10, 1973 requesting that the affidavit be considered by the court. It was not considered by that court.

however, McGarvey, in reliance on the above conversations, did not file a complaint with the Pennsylvania Commission.

A majority[5] of the court of appeals agreed with the district court that "Congress intended this requirement [of establishing prior resort to state remedies] to be a jurisdictional prerequisite to the commencement of suit under the 1967 Act." (See p. A2).[6] Nevertheless, in spite of Merck's vigorous objections to any consideration of the vague and untimely filed affidavit, which Merck had no opportunity to rebut, the court of appeals relied on the affidavit and remanded the action to the district court with directions to stay proceedings in order that McGarvey might apply to the state agency. The court further directed that if state relief was not available (McGarvey agrees that under state law it now cannot be), the district court was thereafter to entertain McGarvey's suit for proceedings on the merits.

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5. An opinion disagreeing with the majority's construction of the statute but concurring in the ultimate result was filed by Judge Garth. See p. A3.

6. Much of the court's reasoning was actually set forth in *Goger v. H. K. Porter Co., Inc.*, 492 F. 2d 13 (3 Cir. 1974), appearing in the appendix hereto at p. A5. In *Goger* the court observed that § 633(b) is virtually identical to a parallel provision of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e-5(c)) which has been repeatedly interpreted by courts to establish resort to state agencies as a prerequisite to the jurisdiction of federal courts. *Love v. Pullman*, 404 U. S. 522, 92 S. Ct. 616, 30 L. Ed. 2d 679 (1972); *Abshire v. Chicago & Eastern Illinois R. R.*, 352 F. Supp. 601 (N. D. Ill. 1972). Congress included this provision in both Acts for the important purpose of preventing federal pre-emption of the jurisdiction of state agencies empowered to act in discrimination cases. See remarks of Senators Humphrey and Dirksen, quoted in *Abshire, supra*, and *Dubois v. Packard Bell Corp.*, 470 F. 2d 973, 975 (10th Cir. 1972) and 110 Cong. Rec. 13087 (1964); and Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, March 15, 16 and 17, 1967, *Hearings* 1967 at p. 43 (Secretary Wirtz), p. 102 (Statement of Mr. Biemiller), and p. 234 (Statement of Commissioner Conway). The court of appeals correctly concluded that like Title VII, the Age Discrimination Act requires resort to an appropriate state agency prior to initiating proceedings in federal court.

Merck's Petition for Rehearing and Suggestion for Rehearing in Banc were subsequently denied by the court of appeals. A motion for stay of mandate was granted by the court and was subsequently extended, effective through June 10, 1974.

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals Has Decided a Federal Question, Namely, the Scope of the Subject Matter Jurisdiction of Federal Courts, in a Way in Conflict With Applicable Decisions of This Court.

The action of the court of appeals, in remanding this case to the district court for proceedings on the merits, is totally inconsistent with the fundamental principle laid down in the Constitution and elucidated through the centuries by this Court that federal courts are courts of limited jurisdiction,[7] empowered to adjudicate only those claims which Congress has authorized them to hear.[8]

This principle dictates that no federal court which lacks statutory authorization to proceed may exercise jurisdiction over a suit on its merits. Moreover, the burden of satisfying a federal court as to its own jurisdiction rests both on the court itself and on the party invoking jurisdiction.[9] As previously noted, however, McGarvey openly conceded during proceedings before the district court that he had not fulfilled the statutory prerequisites to federal jurisdiction. At no time prior to the date of the court's decision did McGarvey alter this position. Under these circumstances, the obligation of the district

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7. *Turner v. President, Directors and the Company of the Bank of North America,* 4 Dall. 8, 1 L. Ed. 718 (1799).

8. U. S. Constitution, Article III, Section 1. See p. A21.

". . . And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill,* 8 How. 440, 12 L. Ed. 1147 (1850).

9. *McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan,* 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

court was clear, and in accordance with the above principles as embodied in the Federal Rules of Civil Procedure,[10] it dismissed the complaint. In view of the court of appeals' holding that on that record the district court reached the correct conclusion, McGarvey's claim cannot be determined in federal court.

This Court has recognized on many occasions that where the federal district court lacks jurisdiction, the appellate function is limited *solely* to a review of the lower court's jurisdictional determination.

> "While the District Court lacked jurisdiction, we have jurisdiction on appeal, *not of the merits* but merely for the purpose of correcting the error of the lower court . . ." *U. S. v. Corrick,* 298 U. S. 435, 440, 56 S. Ct. 829, 80 L. Ed. 1263 (1936) (Emphasis added).[11]

Thus where no affirmative demonstration of jurisdiction appeared on the record before the district court in *McGarvey,* the jurisdiction of the court of appeals was limited to a review of the facts presented by that record. By considering and acting upon mere allegations (which petitioner had no opportunity to rebut) appearing outside

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10. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." F. R. C. P. 12(h)(3) (Emphasis added).

11. See also *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan,* 111 U. S. 379, 381 (1884), in which the Court said:

> "An examination of the record, however, discloses that the Circuit Court had no jurisdiction to try the action; and as, for this reason, we are constrained to reverse the judgment, *we have not deemed it within our province to consider any other questions involved in it.*" (Emphasis added.)

It is clear that a federal court which lacks jurisdiction to proceed on the merits nevertheless has the power, subject to review, to make an initial determination as to its jurisdiction. *U. S. v. United Mine Workers of America,* 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947).

of that record,[12] the court of appeals exceeded its own jurisdiction and committed clear error.

Since the district court lacks statutory authorization to proceed, as found by both the district court and the court of appeals, it has been placed in the untenable position of being directed to conduct a hearing on the merits in a case in which it has no jurisdiction and which it would ordinarily be required to dismiss.[13] As noted by Judge Garth in his concurring opinion:

> ". . . I cannot help observing the fact that . . . [McGarvey] could end up . . . in the very forum denied [him] by the majority's construction of this legislation." (See p. A3)

This is an understatement. McGarvey *will* necessarily "end up . . . in the very forum denied him," and very promptly, for the simple reason that under Pennsylvania law his right to file a complaint with the Pennsylvania Commission expired February 11, 1971. (See pp. 11-12, *infra.*)

Petitioner submits therefore that the action of the court of appeals in remanding to the district court for proceedings on the merits where no subject matter jurisdiction of such proceedings exists decides important fundamental issues concerning the very nature of federal jurisdiction in a way in conflict with the decisions of this Court and thus should be reviewed by this Court.

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12. See Part II of this Petition, p. 10 *infra.*

13. Federal Rule of Civil Procedure 12(h)(3).

II. The Decision of the Court of Appeals Is Based on Consideration and Acceptance of Allegations Contained in an Affidavit Which Was Not Before the District Court, a Departure From the Accepted and Usual Course of Judicial Proceedings Warranting Review by This Court.

In a last ditch attempt to cure or "excuse" fatal jurisdictional defects, McGarvey belatedly filed a vague and conclusory affidavit [14] alleging certain contacts with the Pennsylvania Commission and the U. S. Department of Labor occurring prior to institution of suit in federal court. The affidavit was apparently filed in an attempt to take advantage of this Court's action in *Crosslin v. Mountain States T & T Co.*,[15] which has been interpreted in some circuits to support remands to the district court in cases brought under Title VII of the Civil Rights Act of 1964 where plaintiffs relied on advice given by federal representatives in failing to file state charges.

The court of appeals, accepting the allegations of the affidavit as true and apparently finding them sufficient to

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14. McGarvey's affidavit was filed in the district court one day after the date of the district court's opinion and months after the completion of proceedings on Merck's motion for judgment on the pleadings. Moreover, it is obvious that the allegations contained in the affidavit must have been known to McGarvey throughout the proceedings. Merck believes that "sound principles of judicial administration" precluded the court from considering the affidavit at all. *Andrews v. Chemical Carriers, Inc.*, 457 F. 2d 636 (3rd Cir. 1972), *cert. denied* 409 U. S. 874 (1972).

> "[A] party cannot simply file an ex parte statement in the district court after judgment in extenuation of his conduct there and have it considered as part of the record on appeal." 9 Moore's Federal Practice ¶ 210.04[2], p. 1613.

This issue, of course, was raised by Merck in the proceedings before the court of appeals.

15. 422 F. 2d 1028 (9th Cir. 1970), vacated and remanded 400 U. S. 1004, 91 S. Ct. 562, 27 L. Ed. 2d 618 (1971), on remand 4 FEP Cases 32 (D. Ariz. 1971).

warrant application of this gloss on the *Crosslin* case,[16] remanded the case to the district court, not to consider the affidavit and its significance or permit petitioner to attack it in that forum, but with instructions to hear and determine the merits of charges of age discrimination, if plaintiff could not obtain relief from the Pennsylvania Commission. This purported proviso, however, is not really a condition precedent since Pennsylvania law unequivocally forbids untimely consideration.

If remand of this case is at all appropriate, it should only be for the limited purpose of considering the allegations in McGarvey's affidavit. It is difficult to see how such allegations justify reliance on *Crosslin*. McGarvey attempted in his affidavit, as elaborated in his brief on appeal, to establish that his failure to file a complaint with the Pennsylvania Commission resulted from his reliance on statements allegedly made to him by representatives of both the Pennsylvania Commission and the U. S. Department of Labor. The affidavit alleges that McGarvey telephoned an unnamed clerk in the office of the Pennsylvania Commission prior to initiating federal action; however, nowhere does it affirmatively appear [17] in the affidavit (or elsewhere in the record) that this approach was made

16. In remanding McGarvey, the court cited its earlier decision in *Goger v. H. K. Porter Co., Inc.* (see text at p. A5) which in turn cited the *Crosslin* case in similarly remanding to the district court for proceedings on the merits. Plaintiff in *Goger* apparently approached the Department of Labor while still clearly able to file a complaint with the state agency. Plaintiff's failure to file such a complaint, the court intimated, was thereafter based on the Department's advice. Thus the facts presented by *Goger* resembled the situation present in *Crosslin* far more nearly than do those in *McGarvey*. Merck, of course, submits that the court of appeals erred in *Goger*, as in *McGarvey*, in remanding to a district court lacking subject matter jurisdiction.

17. As noted previously, the burden of proof is on McGarvey to establish the facts upon which the jurisdiction of the district court rests. *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178 (1936).

prior to the expiration of the Pennsylvania statute of limitations.[18] To the contrary, even accepting the affidavit as properly before the court, one must assume that the applicable statute of limitations had expired *prior to* any such approach, thus rendering any issue of "reliance" moot.[19] In any event, the Pennsylvania Commission is now legally powerless to grant McGarvey any relief.[20]

McGarvey's affidavit further establishes that his alleged approach to the U. S. Department of Labor took place in March, 1971, *after* his state cause of action had expired, and at a time when he was advised by legal counsel. Whatever McGarvey's reasons for permitting his state cause of action to lapse, they could not possibly have been based on any assurances obtained at that time from representatives of the Department of Labor.

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18. Under McGarvey's theory of the case, his right to file a complaint with the Pennsylvania Commission expired no later than February 11, 1971, and quite possibly much earlier. The affidavit, however, alleges only that the events in question occurred in February, 1971. McGarvey also failed to identify the person with whom he allegedly spoke or to submit supporting affidavits from the Pennsylvania Commission.

19. Moreover, McGarvey has *at all times* prior to and during proceedings before the district court and the court of appeals been free to approach the Pennsylvania Commission for relief. Yet the record contains no hint of any attempt on his part to do so. And he would remain free to do so, even if the district court's dismissal of this action for want of jurisdiction had been sustained on appeal.

20. The ninety day statute of limitations incorporated in the Pennsylvania Human Relations Act constitutes an integral part of the substantive remedy created therein. 43 P. S. §§ 951 et seq., 959. As such, it creates an actual limit on the jurisdiction of any enforcing body [agency or court] under that statute, and is not subject to waiver. *Schrenkeisen v. Kishbaugh*, 162 Pa. 45, 29 A. 284 (1894); *Bellotti v. Spaeder*, 433 Pa. 219, 221 at n. 2, 249 A. 2d 343 (1969); *Overmiller v. D. E. Horn & Co.*, 191 Pa. S. 562, 159 A. 2d 245 (1960); *Commonwealth ex rel. Hughes v. Maryland Casualty Co.*, 167 Pa. S. 101, 74 A. 2d 683 (1950); *Ratto v. Pennsylvania Coal Co.*, 102 Pa. S. 242, 246, 156 A. 749 (1931). As McGarvey himself conceded to the court of appeals, this period "has clearly elapsed" (Brief of the Appellant at p. 21), and he is foreclosed from obtaining relief from the Pennsylvania Commission. *Richardson v. Miller*, 446 F. 2d 1247 (3 Cir. 1971).

However, it is not necessary to determine this question (or the precise thrust of *Crosslin*) at this time.[21] If *any* excuse for failure to proceed before the state agency can create federal subject matter jurisdiction, a proposition which the petitioner denies, it is for the district court to determine initially, on remand, what the *facts* are and whether they are sufficient to warrant a holding that in the circumstances they give that court subject matter jurisdiction.

III. Summary.

Review should be granted, in order to set aside the judgment of the court of appeals and reinstate the judgment of the district court dismissing the complaint for lack of jurisdiction, either: (1) because the failure of plaintiff for whatever reason to seek timely and appropriate relief from the state agency deprived the federal court of subject matter jurisdiction; or (2) because the court of appeals could not properly act on the basis of allegations never presented to or considered by the district court.

In the alternative, if this Court is of the view that *Crosslin* may justify consideration of plaintiff's reasons for failure to seek relief from the state agency, the case must be remanded to the district court to determine the facts and the applicability, if any, of *Crosslin*. Otherwise, the following holding will stand:

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21. We are not aware of any decisions other than the instant case and *Goger* (see footnotes 6 and 16) in the federal courts of appeals under the Age Discrimination in Employment Act supporting remand in lieu of dismissal under similar circumstances. In *Brennan v. Ace Hardware Corp.*, — F. 2d — (8th Cir. April 3, 1974, No. 73-1498), the Court of Appeals for the Eighth Circuit refused to reverse a district court decision to dismiss the complaint because of a failure by the Department of Labor to exhaust its mediation function, a condition precedent to suit under the Act, even though such a failure (unlike that present here) might have been cured on remand.

1. Federal jurisdiction is lacking, but,

2. is conferred by an ex parte affidavit, filed post district court decision, alleging misleading advice from a state agency, and, therefore

3. the case is reversed and remanded for trial on the merits.

CONCLUSION.

Petitioner, Merck & Co., Inc., respectfully requests the Court to issue a writ of certiorari to the Court of Appeals for the Third Circuit for the purpose of reviewing the judgment of that court.

Respectfully submitted,

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Dated: June 7, 1974

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1558

PAUL J. McGARVEY,

Appellant,

v.

MERCK AND CO., INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted under Third Circuit Rule 12(6)
on December 11, 1973.

Before HASTIE, HUNTER and GARTH, *Circuit Judges.*

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Attorneys for Appellee.

OPINION OF THE COURT.
(Filed March 12, 1974.)

PER CURIAM:

The narrow issue on this appeal is whether the district court erred in dismissing appellant's complaint under the Age Discrimination in Employment Act of 1967 [1] ("1967 Act") for want of jurisdiction on the grounds that appellant failed to establish prior resort to appropriate state remedies. Appellant appeals pursuant to 28 U. S. C. § 1291.

Recently, this Court held in *Goger v. H. K. Porter Co., Inc.*, No. 73-1348 (3d Cir., filed January 31, 1974), that section 633 of the 1967 Act requires an aggrieved individual initially to seek redress from the appropriate state agency at least sixty days prior to instituting suit in federal district court. Thus, the district court was correct in holding that Congress intended this requirement to be a jurisdictional prerequisite to the commencement of suit under the 1967 Act. Nonetheless there are special circumstances present in this case which require us to vacate the district court's decision for equitable reasons, just as we did in *Goger*.

Although appellant has never filed a formal complaint with the Pennsylvania Human Relations Commission,[2] he does allege in an affidavit that he had called the Philadelphia office of the Pennsylvania Human Relations Commission to see if they could help him, but was told to file his complaint with the United States Department of Labor. Apparently the person to whom appellant spoke erroneously concluded that appellant was not within the Commission's jurisdiction.

Consequently, although the ninety-day Pennsylvania statute of limitations for filing a complaint with the Pennsylvania Human Relations Commission has technically ex-

1. 29 U. S. C. § 621, et seq.

2. See 43 Pa. Stat. Ann. § 951, et seq. (1964).

pired,[3] we think that appellant should be allowed to present facts and legal contentions before the Pennsylvania Human Relations Commission regarding the possibility of a waiver or estoppel with respect to the statute of limitations. In the event appellant is barred from presenting his claim before the state agency, we think the district court should nonetheless entertain appellant's complaint since this case comes before us in a posture virtually identical to that of *Goger, supra.*

Accordingly, the district court's order of April 10, 1973 will be vacated with directions that the district court stay this action to allow appellant to present his claim before the state agency and if necessary thereafter, conduct further proceedings not inconsistent with this opinion.

GARTH, *Circuit Judge,* concurring:

In *Goger v. H. K. Porter Company, Inc.,* No. 73-1348 (3d Cir. filed January 31, 1974), I concurred in the result which vacated the District Court's order of dismissal and remanded the cause to the District Court for a hearing on the merits. This relief was fashioned by the majority in *Goger* for "equitable" reasons. Similarly, the relief fashioned here has an "equitable" flavor, and so I again concur in the result.

The result aside, I am impelled to disagree with the majority as respects the statutory interpretation to which they adhere. My reasons for this disagreement and my analysis are set forth in my concurring opinion in *Goger,* and I will not repeat them here. However, I cannot help observing the fact that in both instances the plaintiffs could end up (albeit via an equitable route) in the very forum

3. 43 Pa. Stat. Ann. § 959 (1964).

denied them by the majority's construction of this legislation.

It seems to me that rather than relying upon equitable considerations to fulfill the ". . . remedial purpose of the 1967 Act" (*Goger v. H. K. Porter Company, Inc., supra*), we should adopt a straightforward approach and interpretation of this legislation so as to permit immediate recourse to our Courts.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1348

VIRGINIA L. GOGER,
Appellant,

v.

H. K. PORTER COMPANY, INC.,
Appellee.

(D. C. Civil Action No. 896-72)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued November 5, 1973

Before VAN DUSEN, HUNTER and GARTH, *Circuit Judges*

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OPINION OF THE COURT

(Filed January 31, 1974)

HUNTER, *Circuit Judge:*

This appeal involves a suit by appellant Goger against her former employer for terminating her employment allegedly on account of her age in violation of the Age Discrimination in Employment Act of 1967 (hereinafter "the Act or 1967 Act").[1] The district court dismissed the action for failure to have jurisdiction, holding that under the 1967 Act appellant was required to submit a complaint to the appropriate agency of the State of New Jersey at least sixty days prior to instituting an action in the federal courts. Appellant appeals pursuant to 28 U. S. C. § 1291.

Appellee is a New Jersey corporation with its principal place of business in New Jersey. Shortly after appellant was dismissed, counsel for appellant notified the Secretary of Labor that appellant intended to file a civil action under the 1967 Act and requested that the Secretary fulfill his mediation obligations.[2] The Secretary, acting through his Area Director Hugo C. Sica of the Wage and Hour and Public Contracts Divisions of the United States Department of Labor, acknowledged receipt of the complaint and referred the matter to a compliance officer. All attempts by the compliance officer to reach a satisfactory solution proved fruitless so he advised appellant's counsel that ap-

1. 29 U. S. C. § 621 et seq.

2. 29 U. S. C. § 626(d) provides:

"No civil action may be commenced by an individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. . . . Upon receiving a notice of intent to sue the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion."

pellant was free to institute her contemplated civil action under the Act. At no time prior to the institution of this suit did appellant file a complaint with the Division on Civil Rights of the Department of Law and Public Safety, the New Jersey State Agency responsible for the elimination of unlawful discrimination in employment based on age.[3] Such a complaint is now barred under New Jersey law, which requires all complaints to be filed within 180 days of the alleged act of discrimination.[4]

Since a state agency existed in New Jersey having authority to grant appellant relief from the alleged discrimination,[5] the central issue before us is whether section 633(b)[6] of the 1967 Act requires an aggrieved individual initially to seek redress from the state agency before instituting suit in federal district court. Appellant and the Secretary of Labor in an amicus curiae brief argue that under the Act an aggrieved individual has the choice of pursuing either federal or state remedies; only if he chooses the latter is the sixty-day limitation of section 633(b)

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3. N. J. Stat. Ann. 10:5-1 et seq.

4. N. J. Stat. Ann. 10:5-18. Appellant states in her complaint that while this appeal was pending she also unsuccessfully sought to have the Attorney General of New Jersey relate her state cause of action back to the institution of her suit in the district court.

5. N. J. Stat. Ann. 10:5-6, 5-17, 5-19. *Cf. Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F. 2d 1028 (9th Cir. 1970), *vacated and remanded*, 400 U. S. 1004 (1971).

6. 29 U. S. C. § 633(b) provides:

"*Limitation of Federal action upon commencement of State proceedings*

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law*, unless such proceedings have been earlier terminated . . . ." (Emphasis added.)

applicable. In their view section 633(b) does not deal with the situation where no state proceedings "have been commenced."

We agree with the district court, however, that although the Act does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance.

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (hereinafter "1964 Act") specifically prohibited discrimination on the grounds of race, color, religion, sex or national origin.[7] Congress recognized that the 1964 Act left untouched a major problem—age discrimination—and consequently directed the Secretary of Labor to make a study of the full magnitude of this problem.[8] From this common origin arose the 1967 Act.

A comparison of these two statutes reveals that section 633(b) is virtually identical to the language of the parallel provision of the 1964 Act,[9] and courts have repeatedly interpreted the latter as requiring that appropriate state agencies be given a prior opportunity to consider discrim-

7. 42 U. S. C. § 2000e-2.

8. Act of July 2, 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265.

9. 42 U. S. C. § 2000e-5(b), *as amended*, 42 U. S. C. § 2000e-5(c) provides:

> "In the case of an alleged unlawful employment practice occurring in a State, . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . ., *no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law*, unless such proceedings have been earlier terminated. . . ." (Emphasis added.)

ination complaints before resorting to the federal courts.[10] *Love v. Pullman Co.*, 404 U. S. 522 (1972); *Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F. 2d 1028 (9th Cir. 1970), *vacated and remanded*, 400 U. S. 1004 (1971); *Electrical Workers, Local 5 v. EEOC*, 398 F. 2d 248 (3d Cir. 1968), *cert. denied*, 393 U. S. 1021 (1968).

The minor differences between section 633 and its counterpart under the 1964 Act are insignificant and provide no support for an interpretation of the former which is contrary to the Supreme Court's construction in *Love v. Pullman*, *supra*. Moreover, the legislative history of the 1967 Act, though largely couched in terms identical to that of the statute,[11] nonetheless is devoid of any intention of Congress to deviate from the basic philosophy of the 1964 Act of initially giving state agencies sixty days to resolve the problem.[12] Indeed, at the public hearings before the Senate Subcommittee on Labor at least two individuals suggested to the Subcommittee the desirability of retaining Title VII's feature of deferring in the first instance to state agencies for a limited period of time.[13] We therefore con-

10. Moreover, under both acts an aggrieved individual is given a longer period of limitations within which to bring his federal action when there is an appropriate state agency available for resolving allegedly unlawful employment practices. 42 U. S. C. § 2000e-5(d), as amended, 42 U. S. C. § 2000e-5(e); 29 U. S. C. § 626(d).

11. *E.g.*, 2 U. S. Cong. & Adm. News at 2218-19 (1967).

12. For a discussion of the legislative history of Title VII of the 1964 Act, see *Crosslin v. Mountain States Tel. & Tel. Co.*, 422 F. 2d at 1030-31.

13. Age Discrimination in Employment, Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate 1, 102 & 234 (March 15-17, 1967), which states *inter alia:*

"MR. BIEMILLER.

* * * *

"It would seem to me it would be a far more practical and preferable solution if you would take the pattern that was developed by Senator Dirksen and Senator Humphrey, working in

clude that section 633(b) required appellant to seek relief from the appropriate New Jersey agency prior to instituting her suit in the federal district court.

Lastly, appellant and the Secretary of Labor argue that notwithstanding our interpretation of section 633(b) appellant should not be barred from seeking relief under the Act since appellant filed her federal complaint only after a Department of Labor compliance officer had advised her counsel that the Department's efforts to reach a satisfactory settlement had failed and that appellant was thus free to institute an action under the Act. *See Love v. Pullman,* 404 U. S. 522 (1972); *Crosslin v. Mountain States Telephone Co.,* 400 U. S. 1004 (1971); *Parker v. General Telephone Co.,* 476 F. 2d 595 (9th Cir. 1973); *Mitchell v. Mid-Continent Spring Co.,* 466 F. 2d 24 (6th Cir. 1972); *Sanchez v. Standard Brands, Inc.,* 431 F. 2d 455 (5th Cir. 1970); *Choate v. Caterpillar Tractor Co.,* 402 F. 2d 357 (7th Cir. 1968).

While we do not consider the failure to file a timely complaint with the appropriate state agency a mere "tech-

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13. (Cont'd.)
concert, in connection with Title VII of the Civil Rights Act of 1964 creating the Equal Employment Opportunities Commission. There, as I recall, when you have a State law that is substantially in agreement with the Federal law a matter of 60 days is given to the State fair employment agency to try to solve the problem.

"At the end of that time, if the matter is not resolved, the case is moved to the Federal agency."

* * * *

"MR. [JUDGE] CONWAY. The only thing that occurs to me in reference to this, Senator, is the fact that already a provision is set forth in the Civil Rights Act of 1964 that seems to work quite effectively and in respect to this matter it is not unlike the situation that you present.

"That is to say, the Federal Government does have jurisdiction under the 1964 act but does defer to State agencies with power of enforcement and also provides for a time limit within which action must first be taken by the State where such cases are so deferred."

nical'' omission,[14] we nonetheless consider equitable relief to be appropriate in view of the total absence, to our knowledge, of any judicial decision construing section 633(b) during the period involved here and in view of the remedial purpose of the 1967 Act.[15] In the future, however, we think the Congressional intent that state agencies be given the initial opportunity to act should be strictly followed and enforced. *See Dubois v. Packard Bell Corp.*, 470 F. 2d 973 (10th Cir. 1972). For the reason stated in the first sentence of this paragraph, we need not decide on this record whether a plaintiff must always proceed first before the state agencies.

The order of the district court of February 20, 1973 will be vacated and the cause remanded for a hearing on the merits of appellant's complaint.

GARTH, *Circuit Judge*, concurring:

I concur in the result reached by the majority opinion. However, I do not agree that merely because 29 U. S. C. § 633(b) of the Age Discrimination in Employment Act of 1967 (hereinafter "ADEA") is similar in language to 42 U. S. C. § 2000e-5(b) of Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), they are necessarily subject to the same construction. The various dissimilari-

14. Cf. *Love v. Pullman, supra; Sanchez v. Standard Brands, Inc., supra; Choate v. Caterpillar Tractor Co., supra.*

15. *Compare Sanchez v. Standard Brands, Inc.*, 431 F. 2d 455 (5th Cir. 1970). We note that following the Supreme Court's remand in *Crosslin v. Mountain States Telephone Co.*, 400 U. S. 1004 (1971), the district court entertained a motion to dismiss because the appellant had acted too late in filing charges with the state agency. *Crosslin v. Mountain States Telephone Co.*, Civil No. 6863 (D. Ariz. filed June 3, 1971). The court reasoned that since virtually the same arguments raised in the motion were before the Supreme Court, the motion had to be denied otherwise the Supreme Court's remand would have been a futile act.

ties between the two Acts (and in particular the presence of § 633(a)[1] in ADEA, which has no counterpart in Title VII) impel me to the conclusion that there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act.

42 U. S. C. § 2000e-5(b) establishes the steps to be taken by a complainant before the filing of a Title VII suit. These procedures should be compared with 29 U. S. C. § 626(b) (*not* § 633(b)—the statute at issue here) which prescribes the jurisdictional prerequisites for filing suit under ADEA.

By contrast, 29 U. S. C. § 633, the statute with which we are here concerned, does not deal with jurisdictional prerequisites for instituting suit, but rather is concerned with Federal and State relationship. Thus, even though the language of § 633(b) is similar to that of § 2000e-5(b), its purpose and thrust is different, and in my opinion does not require resort to state courts prior to the filing of suit under ADEA.

Section 633(b) provides inter alia ". . . no suit may be brought under § 626 of this Title [29] before the expiration of 60 days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ." The Secretary of Labor in its *amicus* brief asserts that ". . . the limitation upon the right to file suit under the [ADEA] applies *only* if proceedings have *already* been initiated under existing State law. There is no requirement [in this language], however, that such State proceedings must *first* be initiated—*i.e.*, that a complaint be made to the appropriate State agency—before suit may be filed under the [Federal ADEA]."

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1. § 633(a) provides:

"Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action."

In support of that construction the Secretary of Labor asserts that the sole Congressional purpose underlying the enactment of 29 U. S. C. § 633(b) was to give the State time to act on a complaint *if* an aggrieved individual chose to proceed there first. (That choice might well be made by a complainant if a State affords a greater remedy against age discrimination or imposes prohibitions against age discrimination greater or stricter than those provided under Federal law.[2])

The construction given this statute by the Secretary of Labor is persuasive, and as it is that agency which is charged with the administration of ADEA, it should be given great deference, *Udall v. Tallman*, 380 U. S. 1 (1964).

I do not believe that it was the intent of Congress to require, prior to the institution of a Federal action, the commencement of a State proceeding which, under § 633(b), need not be concluded and which in any event would be superseded by the filing of the Federal action under § 633(a).

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2. Former Labor Secretary W. Willard Wirtz has stated that the preservation of the jurisdiction of State agencies in § 14 [29 U. S. C. § 633] will allow such agencies to impose prohibitions against age discrimination in employment stricter than those provided under the Federal law. Hearings on S830 Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U. S. Senate, 90th Cong., 1st Sess. 1967, page 48.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1558.

PAUL J. McGARVEY,

Appellant,

v.

MERCK AND CO., INC.

(D. C. Civil Action No. 417-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: HASTIE, HUNTER and GARTH, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 11, 1973, be, and the same is hereby vacated, and the cause is hereby remanded to the District Court with direction to stay this action to allow appellant to present his claim before the State agency, and, if necessary, thereafter to conduct further proceedings in accordance with the opinion of this Court.

ATTEST:

THOMAS F. QUINN,
Clerk.

March 12, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1558.

PAUL J. McGARVEY,
Appellant,

v.

MERCK AND CO., INC.,
Appellee.

ORDER SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* HASTIE, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH,
Circuit Judges.

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

JAMES HUNTER, III,
James Hunter, III,
Judge.

Dated: April 4, 1974

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

Civil Action No. 417-72.

PAUL J. McGARVEY,

Plaintiff,

v.

MERCK & CO., INC.,

Defendant.

OPINION AND ORDER.

APPEARANCES: TOMAR, SELIGER, SIMONOFF & ADOURIAN, ESQUIRES,
By: Robert F. O'Brien, Esq.,
For the Plaintiff.

DONALD S. BROOKS, ESQUIRE,
For the Defendant
Of Counsel:

DRINKER, BIDDLE & REATH, ESQS.,
By: Michael Floyd, Esq.,
For the Defendant.
(Pennsylvania Bar)

FISHER, *District Judge*

The question presented by these motions is one under the Age Discrimination in Employment Act of 1967, 29 U. S. C. Sec. 621 *et seq.* Plaintiff McGarvey alleges in the complaint that the defendant dismissed him from employment on November 13, 1970 after twenty-one years of

service because he was fifty-nine years old. Plaintiff was employed as the manager of the laboratory and office services of defendant's plant in West Point, Pennsylvania. Plaintiff seeks both injunctive and compensatory relief as provided under the Act.

On April 20, 1971 plaintiff notified the United States Secretary of Labor, pursuant to 29 U. S. C. Sec. 626(d), of his intent to sue the defendant. Plaintiff filed his complaint with this Court on March 2, 1972, but did not allege that he had filed a complaint with or commenced proceedings before the Pennsylvania Human Relations Commission pursuant to 43 P. S. Sec. 951 *et seq.* Under Pennsylvania law, plaintiff had ninety days from the date of the alleged discriminatory act to proceed before the Human Relations Commission. 43 P. S. Sec. 959.

In its answer defendant contends, *inter alia,* that 29 U.S.C. Sec. 633(b) [1] bars this action because plaintiff failed to proceed before the Pennsylvania Human Relations Commission. Plaintiff moves to strike this particular defense. Defendant moves for judgment on the pleadings on the basis of this defense. Thus, the narrow issue presented is whether 29 U.S.C. Sec. 633(b) requires plaintiff to allege prior resort to state statutory remedies before commencing suit in this Court.

Plaintiff argues the language of Section 633(b), that no suit *may be* brought before sixty days *after* state pro-

1. 29 U. S. C. Sec. 633(b) provides:

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under Section 626 of this title before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated: *Provided,* that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law . . . .

ceedings have commenced, does not imply that state proceedings *must* be brought prior to filing suit in federal court. Plaintiff theorizes that this language provides a choice of federal or state remedies.[2] In his view, Section 633(b) applies only when a state proceeding has already begun but does not deal with the situation where no state proceedings have commenced.

Defendant relies upon the cases which interpret 42 U. S. C. Sec. 2000e-5(c),[3] an analogous provision of Title VII of the Civil Rights Act of 1964, to require primary resort to state remedies as a jurisdictional prerequisite. *Love v. Pullman Co.*, 404 U. S. 522, 525-26 (1972); *Equal Employment Opportunity Commission v. Union Bank*, 408 F. 2d 867, 869 (9th Cir. 1968); *Stebbins v. Nationwide Mutual*

2. In support of his theory plaintiff relies on an unverified xerox copy of a letter from the regional solicitor of the U. S. Department of Labor to plaintiff's attorney dated December 20, 1972. Under the Federal Rules of Civil Procedure it is clear that this Court may not consider or rely upon such a document in considering these motions. F. R. Civ. P. 12(b) and 56(e).

3. 42 U. S. C. Sec. 2000e-5(c) states:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law . . . .

Public Law 92-261, 86 Stat. 103 (1972) redesignated former subsection 42 U. S. C. Sec. 2000e-5(b) as subsection 5(c). Reference in subsection (c) to subsection (b) of this section was, in the original, subsection (a) of this section. Thus, the cases prior to the enactment of P. L. 92-261 when referring to 42 U. S. C. Sec. 2000e-5(b) were concerned with this same subsection which has now been redesignated as 42 U. S. C. Sec. 2000e-5(c).

Insurance Co., 382 F. 2d 267, 268 (4th Cir. 1967), *cert. denied*, 390 U. S. 910, *reh. denied*, 390 U. S. 976 (1968); *Motorola, Inc. v. Equal Employment Opportunity Commission*, 460 F. 2d 1245 (9th Cir. 1972); *Oubichon v. North American Rockwell Corp.*, 325 F. Supp. 1033, 1036 (C. D. Calif. 1970); *cf. International Brotherhood of Electrical Workers v. United States Equal Opportunity Commission*, 398 F. 2d 248, 252 (3d Cir. 1968), *cert. denied*, 393 U. S. 1021 (1969). Many of these cases concern the filing requirements under Title VII when unfair employment practice charges are before both a state agency and the federal agency, the Equal Employment Opportunity Commission (EEOC). *See, e.g., Vigil v. American Tel. & Tel. Co.*, 455 F. 2d 1222, (10th Cir. 1972); *Fix v. Swinerton and Walberg Company*, 320 F. Supp. 58 (D. Colo. 1970). When such charges are presented to both federal and state agencies, it is clear that Congress intended state agencies be afforded the first opportunity to redress alleged unfair employment practices. *Abshire v. Chicago and Eastern Railroad Co.*, No. 72 C 311 (N. D. Ill. Dec. 11, 1972), 5 BNA Fed. Emp. Practice Cases 296, 298 *citing* 110 Cong. Rec., Part 10, 13008 and 12721 (1964). Defendant argues that the reasoning of the cases[4] concerning Subsection 2000e-5(c) of the Civil Rights Act of 1964 should apply to Section 633(b) as well, because the language of the two sections is nearly identical and the legislative history of Section 633(b) reveals the same purpose.[5]

This Court finds itself in agreement with the defendant, for there are no meaningful distinctions to be drawn between Subsection 2000e-5(c) and Section 633(b) for the

4. *See, Abshire, supra* at 297-98.

5. 1967 *U. S. Code Cong. & Adm. News*, House Report No. 805, Oct. 23, 1967, at 2213-27; IV *Senate Miscellaneous Reports on Public Bills*, 12750-4, Senate Report No. 723, Nov. 4, 1967; 1967 *Hearings*, Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, March 15, 16 and 17, 1967 at 1-405, esp. at 234 f and 102 f.

purposes of this action. The language and legislative history of both provisions are substantially the same. Furthermore, to construe the statute as plaintiff suggests would create a "loophole" in Section 633(b) which flies in the face of congressional intent. Plaintiff fails to allege any resort to the appropriate state agency within the period of the state Statute of Limitations which now has elapsed. Thus, any plaintiff could easily by-pass state agencies by waiting, for whatever reasons, until after the state Statute of Limitations had expired before commencing suit in a federal forum. Congress clearly did not intend to permit prior resort to the appropriate state remedy, this Court lacks jurisdiction over the subject matter. Fed. R. Civ. P. 12(h)(3).

Accordingly, it is hereby ORDERED that plaintiff's complaint be dismissed without costs.

CLARKSON S. FISHER,

Clarkson S. Fisher,

United States District Judge.

Dated: April 10, 1973.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

1. Constitution of the United States, Article III, Section 1, is as follows:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. Federal Rule of Civil Procedure 12(h)(3) is as follows:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

3. The Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 et seq., is as follows:

§ 621. Congressional statement of findings and purpose.

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration

of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ *622. Education and research program; recommendation to Congress.*

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures—

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ *623. Prohibition of age discrimination—Employer practices.*

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, in-

dicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

§ *624. Study by Secretary of Labor; reports to President and Congress.*

The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress.

§ *625. Administration.*

The Secretary shall have the power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist

him in the performance of his functions under this chapter;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ *626. Recordkeeping, investigation, and enforcement—Attendance of witnesses; investigations, inspections, records, and homework regulations.*

(a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid

minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Sections 255 and 259 of this title shall apply to actions under this chapter.

§ *627. Notices to be posted.*

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

§ *628. Rules and regulations; exemptions.*

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as he may find necessary and proper in the public interest.

§ *629. Criminal penalties.*

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however,* That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ *630. Definitions.*

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided,* That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures em-

ployees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

§ *631. Age limits.*

The prohibitions in this chapter shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.

§ *632. Annual report to Congress.*

The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this chapter as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and

maximum ages established by this chapter, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as he may deem pertinent.

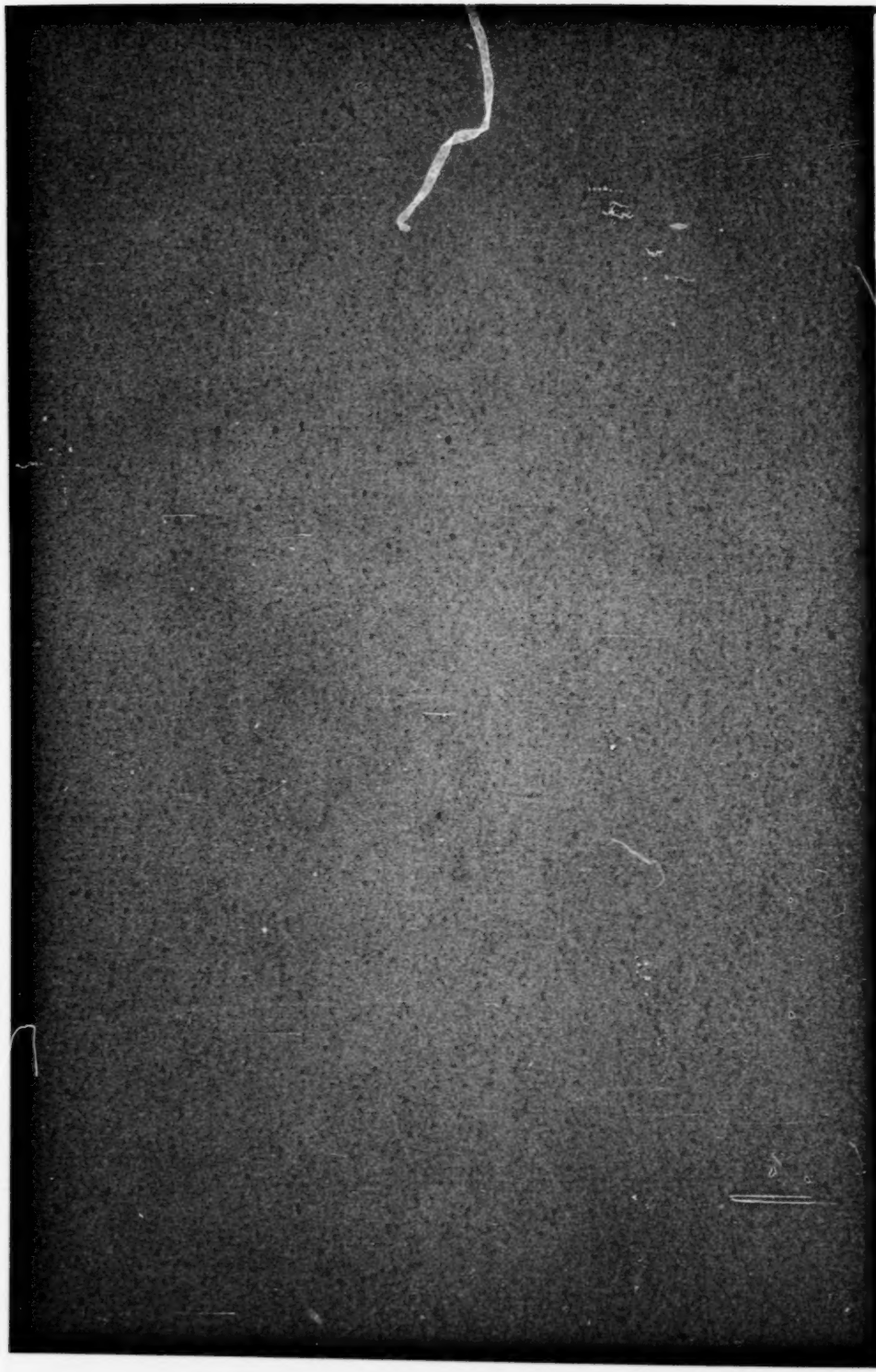
§ *633. Federal-State relationship—Federal action superseding State action.*

(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ *634. Authorization of appropriations.*

There are hereby authorized to be appropriated such sums, not in excess of $3,000,000 for any fiscal year, as may be necessary to carry out this chapter.



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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1840

MERCK AND CO., INC.,

Petitioner,

v.

PAUL J. McGARVEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Respondent, Paul J. McGarvey, opposes the Petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 12, 1974.

OPINIONS BELOW.

The opinion of the court of appeals is reported as a decision without a published opinion at 493 F. 2d 1401. The court's opinion appears in the Petitioner's Appendix at p. A1, and Judge Garth's concurring opinion appears in the Appendix at p. A3. The opinion of the district court is reported at 359 F. Supp. 525, and it appears in the Appendix at p. A16. The opinion of the court of appeals in *Goger v. H. K. Porter Co., Inc.*, which construes the same statute and involves legal issues essentially identical to those presented by the instant case, is reported at 492 F. 2d 13, and appears in the Appendix at p. A5. The district court's opinion in *Goger* is reported unofficially at 5 Fair Employment Practice Cases 695.

JURISDICTION.

The judgment of the court of appeals was entered on March 23, 1974. Petitioner's request for a rehearing was denied by an order entered on April 4, 1974. The Petitioner invokes the jurisdiction of this court pursuant to 28 U. S. C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED.

1. Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 et seq. (See Petitioner's Appendix, p. A21).

2. Rule 19, Supreme Court Rules, U. S. Sup. Ct. Rule 19, 28 U. S. C.

3. 28 U. S. C. § 1254(1).

STATEMENT OF THE CASE.

Basis for Federal Jurisdiction in the District Court.

Plaintiff-Respondent, McGarvey, invoked the district court's jurisdiction under the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 621 et seq., particularly § 626(c). (See Petitioner's Appendix, pp. A21, A27.)

Nature of the Case and the Proceedings Below.

The Plaintiff-Respondent Paul J. McGarvey, hereinafter "McGarvey," was formerly employed with Merck and Co., Inc., hereinafter "Merck," at its Research Laboratory Division, located in West Point, Pennsylvania, for over eighteen years. On November 13, 1970, McGarvey was fired from his job as manager of the laboratory and office services at Merck's West Point plant because he was fifty-nine years old.

After reading of the Age Discrimination Act, Mr. McGarvey telephoned the Philadelphia office of the Pennsylvania Human Relations Commission, hereinafter "PHRC," in February, 1971 and explained his case. He was advised to take his complaint to the U. S. Department of Labor. Mr. Leonard Myers, an attorney and a friend of McGarvey, consulted with the U. S. Department of Labor's Regional Attorney, and was advised that McGarvey should bring any complaint that he had concerning Merck's termination of him because of his age to the Philadelphia office of the Wage and Hour Division of the U. S. Department of Labor.

McGarvey took his complaint against Merck to Mr. Thomas Johnson, an investigator for the Wage and Hour Division, on March 3, 1971. Mr. Johnson assured McGarvey that the Wage and Hour Division was the proper place for his complaint. On March 31, 1971, McGarvey signed an

authorization permitting the U. S. Department of Labor to investigate his complaint, and on April 23, 1971, the Department initiated an investigation. Based upon the information and advice of both the PHRC and the U. S. Department of Labor, McGarvey did not file a complaint with the PHRC.

On April 20, 1971, McGarvey notified the Secretary of Labor of his intent to sue Merck, pursuant to Section 7(d) of the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 626(d) (the statute is reproduced in Petitioner's Appendix, p. A27). McGarvey filed his complaint in the United States District Court for the District of New Jersey on March 2, 1972, pursuant to Section 7(c) of the Act, 29 U. S. C. § 626(c). Merck answered, denying McGarvey's allegations and contending as a defense that the complaint was barred by McGarvey's failure to file a complaint with the PHRC, as allegedly required by Section 14(b) of the Act, 29 U. S. C. § 633(b). McGarvey moved to strike this defense, and Merck filed a cross-motion for a judgment on the pleadings. These motions were considered by the court without a hearing or oral argument.

District Court Judge Clarkson S. Fisher held, in an opinion and order dated April 10, 1973, and filed April 11, 1973, that ". . . where substantial relief against alleged age discrimination is available under state law, 29 U. S. C. Sec. 633(b) requires the person aggrieved to pursue state remedies prior to filing a complaint with this court." (See Petitioner's Appendix, p. A20(a), 350 F. Supp. at 528). Judge Fisher ruled that due to McGarvey's failure to allege a resort to "the appropriate state remedy," the district court lacked jurisdiction over the subject matter of Mr. McGarvey's suit, and therefore ordered that Mr. McGarvey's complaint be dismissed.

On April 9, 1973, counsel for McGarvey mailed an affidavit to the district court attesting to McGarvey's consultation with the PHRC and the Wage and Hour Division of

the United States Department of Labor. The affidavit was not filed until April 11, 1973 and apparently was not considered by the district court. At no time prior to the filing of McGarvey's Notice of Appeal did Merck request a hearing in the district court to challenge the assertions contained in the affidavit.

On May 10, 1973, McGarvey appealed the district court's dismissal of the complaint, challenging the district court's construction of 29 U.S.C. § 633(b). Alternatively, Mr. McGarvey argued that if the court of appeals upheld the district court's interpretation of the statute, that he be allowed to maintain his complaint on equitable grounds.

The United States Department of Labor obtained permission from the court to file an *amicus curiae* brief in support of McGarvey's argument that § 633(b) does not require prior resort to state agencies as a prerequisite to the district court's jurisdiction.

In a *per curiam* decision, the majority of the three judge panel upheld the district court's conclusion that § 633(b) required an aggrieved individual to resort initially to the appropriate state agencies charged with remedying age discrimination as a jurisdictional prerequisite to seeking relief in the federal courts. The majority held, however, that McGarvey's unsuccessful attempts to obtain relief from the PHRC constituted "special circumstances" warranting the court ". . . to vacate the district court's decision for equitable reasons, . . ." (See Petitioner's Appendix, p. A2). The majority ordered that the district court stay the suit in order to allow McGarvey to present his claim to the PHRC, ". . . and if necessary thereafter, conduct further proceedings not inconsistent with this opinion." (See Petitioner's Appendix, p. A3). Circuit Judge Leonard Garth concurred with the result reached by the majority, but disagreed with the majority's interpretation of § 633(b). (See Petitioner's Appendix, pp. A3, 4).

Merck's Petition for Rehearing and Suggestion for Rehearing in Banc was denied by the court of appeals. Merck's motion for stay of mandate was granted by the court, and later extended through June 10, 1974.

SUMMARY OF ARGUMENT.

The Rules of the Supreme Court provide that review of a case by the Supreme Court pursuant to a petition for certiorari is a matter of the court's discretion, and such a petition for certiorari will be granted only afer a showing that special and important reasons warrant review by the court. Merck's petition presents no question of constitutional or statutory interpretation, nor any issue of public policy justifying this Court's attention. Therefore, the petition should be denied.

Merck's claim that the court of appeals' decision violates the usual and accepted course of judicial proceedings is without factual basis. The court of appeals' just and equitable action permits a resolution of the merits of the complaint, and avoids penalizing McGarvey for relying in good faith on the erroneous advice of the U. S. Department of Labor and the Pennsylvania Human Relations Commission. Further, the court of appeals' decision comports with decisions of this court and those of other courts of appeals construing Title VII of the Civil Rights Act of 1964, to which the Age Discrimination in Employment Act of 1967 has been analogized.

Finally, if *any* issue warranting review by this Court is presented by the instant case, the *only* issue that should be examined is the proper construction of Section 14(b) of the Age Discrimination in Employment Act of 1967, 29 U. S. C. § 633(b).

ARGUMENT.

I.

Merck's Petition for a Writ of Certiorari Raises No Special and Important Questions of Law for the Court to Decide, and Should Therefore Be Denied.

Merck's Petition for a Writ of Certiorari makes the argument that the court of appeals has failed to properly apply § 14(b) of the Age Discrimination in Employment Act,[1] hereinafter "the Act," to the instant facts. Merck notes that the court of appeals agreed with the district court's conclusion that § 633(b) of the Act establishes the prior resort to appropriate State remedies as a prerequisite to the existence of subject matter jurisdiction in the district court. Merck argues that, since the facts show that McGarvey never filed a complaint with the PHRC, the district court was deprived of subject matter jurisdiction, regardless of the reasons for McGarvey's failure to file a com-

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1. § 633. Federal-State relationship—Federal action superseding State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

plaint with the PHRC. Merck concludes that the court of appeals had no choice but to affirm the district court, and argues that the court of appeals' failure to do so amounts to a misapplication of § 633(b).

Merck attributes the court of appeals' misapplication of § 633(b) to the court's erroneous reliance upon McGarvey's affidavit.[2] The court of appeals cited that part of the affidavit in which McGarvey described his attempts to resort to the PHRC in February, 1971, and the advice he received from the PHRC directing him to take his complaint to the Department of Labor, as grounds for vacating the district court's dismissal ". . . for equitable reasons, . . ." (Petitioner's Appendix, p. A2). Merck objects to the court's reliance on the affidavit because (a) it was not presented to the district court, and therefore was not properly before the court of appeals, and (b) Merck had no opportunity to contest the alleged facts in the affidavit.[3]

28 U. S. C. § 1254(1), under which Merck invokes this Court's jurisdiction, provides that decisions of the courts of appeals may be reviewed by this Court "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ." As this Court noted with respect to an earlier form of the present statute authorizing review by a writ of certiorari, "the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this Court a comprehensive and unlimited power." *Forsyth v. City of Hammond*, 166 U. S. 506, 513 (1897). The Court's power of review through a writ of certiorari is

2. Merck characterized this affidavit as ". . . a last ditch attempt to cure or 'excuse' fatal jurisdictional defects, . . ." Petition, p. 10. For a discussion of the affidavit, see Part II of the Argument, *infra*.

3. See Part II of Argument, *infra*.

employed with a degree of caution and care commensurate with the virtually unlimited breadth of that power. As Rule 19(1) of the Rules of this Court states, "[a] review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." U. S. Sup. Ct. Rule 19(1), 28 U. S. C. As the Court noted in discussing the proper exercise of this power of review,

> [t]he jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. *Magnum Import Company v. Coty*, 262 U. S. 159, 163 (1923).

Among the court of appeals' decisions outlined in Rule 19 of the Supreme Court Rules which might warrant a grant of a petition for a writ of certiorari by this court are those courts of appeals' decision which (1) conflict with decisions from other circuits; (2) decide an important state or territorial question in a way which conflicts with applicable state or territorial law; (3) decide an "important" question of federal law which has not been previously settled by the Supreme Court; (4) decide a federal question in a way which conflicts with applicable Supreme Court decisions; (5) depart so far from the usual course of judicial proceedings that the Supreme Court must exercise its supervisory powers over the offending courts of appeals.

The case at bar might appear to present a court of appeals decision deciding a federal question which the

Supreme Court has not previously settled, i.e., the correct interpretation and application of § 633(b).[4] Merck does *not*, however, challenge the construction applied to § 633(b) by either the district court or the majority of the court of appeals. Indeed, Merck takes the court of appeals' construction of the statute as the *foundation* for its petition, not as its *subject*. No question of the proper construction of any part of the Act, or for that matter, any other statute is presented by Merck's petition for the simple reason that Merck's interpretation of § 633(b) was accepted completely by the court of appeals.

Respondent McGarvey submits that Merck's petition for a writ of certiorari does not present ". . . questions of importance which it is in the public interest to have decided by this court of last resort." *Magnum Import Co. v. Coty, supra.* Merck's petition describes no issues of national policy, of statutory construction, or of constitutional interpretation for this Court to hear and decide, and therefore it should not be granted by the Court.

II.

The Court of Appeals Has Not Acted Improperly or Contrary to the Decisions of This Court and Therefore, Certiorari Should Not Be Granted.

Petitioner Merck attempts in its Petition to place this case under the ambit of Rule 19(1)(b) by arguing that the court of appeals' decision in this case (and incidentally its decision in *Goger v. H. K. Porter Co., Inc., supra,* as

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4. At this time, the only decision that Respondent has found construing § 633(b), other than the decision of instant courts below, is *Goger v. H. K. Porter Co., Inc.,* 492 F. 2d 13 (3rd Cir. 1974), vacating and remanding *Goger v. H. K. Porter Co., Inc.,* — F. Supp. —, 5 FEP Cases 695 (D. N. J. 1973). No other Circuit, nor this court, has spoken on the interpretation of § 633(b).

well[5]) departs so far from the usual course of judicial proceedings that it flies in the face of applicable decisions of this Court, and therefore, warrants review. Merck apparently suggests that the "special and important reasons" justifying review by this Court pursuant to a writ of certiorari are readily apparent in the court of appeals' egregiously erroneous conduct in this case.

Essentially, the court of appeals did two things to which Merck objects: (a) it remanded to the district court with instructions to stay the cause in order to permit McGarvey ". . . to present facts and legal contentions before the Pennsylvania Human Relations Commission regarding the possibility of a waiver or estoppel with respect to the statute of limitations.";[6] (b) it indicated that, should McGarvey be barred from presenting his complaint to the PHRC, the district court ". . . should nonetheless entertain appellant's complaint since this case comes before us in a posture virtually identical to that of *Goger, supra.*"[7] Merck suggests that the court of appeals was mistakenly swayed by McGarvey's affidavit. Merck argues vigorously that this affidavit should not have been considered by the court of appeals because (1) it was not properly before, and was not considered by the district court, and (2) Merck had no opportunity to challenge the facts alleged in the affidavit. Merck is unimpressed by the court of appeals' statement that its decision was justified by ". . . equitable reasons, just as [was its decision] in *Goger.*"[8]

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5. See Petition, p. 11, n. 16.

6. See Petitioner's Appendix, p. A3; *see also* 43 P. S. § 959 (1964).

7. See Petitioner's Appendix, p. A3. The specific features of the court of appeals' remedy are discussed in pp. 20-22, *infra.*

8. See Petitioner's Appendix, p. A2.

A. McGarvey Has Acted in Good Faith at All Times Relevant to This Complaint.

The entire thrust and tone of Merck's argument before the court of appeals, and in support of this petition, is that McGarvey intentionally evaded his state remedy, and that he attempted to cover this evasion with the affidavit filed in the district court. Merck seems to suggest that McGarvey filed the affidavit at a time when he knew the district court would not consider it, and at a time when he knew that Merck would not have an opportunity to challenge the facts contained in the affidavit.

As McGarvey explained to the court of appeals, he did not allege a prior resort to his state remedies in his complaint because everything that he knew prior to the district court's decision indicated that he had *no* state remedy. The PHRC told him that he should take his complaint to the U. S. Department of Labor, and when he subsequently went to that federal department, he was advised that he, indeed, had brought his complaint to the proper agency. As a result of this advice, he never filed a complaint with the PHRC, for the simple reason that both the PHRC and the federal agency told him he should not do so.

Similarly, McGarvey did not allege in his complaint that he "resorted" to the PHRC because all the state and federal agencies he contacted told him that the PHRC had no authority over, or business with his complaint. Thus, far from attempting to "by-pass" the PHRC, as Merck and the district court suggest, McGarvey was directed elsewhere by the PHRC. Rather than deviously scheming to avoid a state remedy to which he would readily have resorted if he were making a good faith effort to pursue his complaint, as Merck contends, McGarvey was searching for *the proper forum* for his complaint. All the advice he re-

ceived directed him to the federal bureaucracy, and later, the federal courts, and, in good faith, that is where he went.

In a companion argument, Merck suggests that McGarvey manufactured the facts presented in his affidavit at the last minute in order to excuse his failure to file a complaint with the PHRC. Merck argues that the ersatz nature of the affidavit is demonstrated by McGarvey's intentional submission of the affidavit in time to be placed into the record, but too late to be considered by the district court, and too late to be challenged by Merck.[9]

Merck's argument concerning the affidavit amounts to a series of groundless accusations. The timing of the district court's decision was not known by McGarvey or by his counsel. McGarvey's motion to strike and Merck's motion for judgment on the pleadings were presented to the district court on briefs *alone*. The district court did not conduct an evidentiary hearing, and no oral argument on the motions was heard. The affidavit was sent to the district court in the full expectation that the court would consider it, and counsel for McGarvey was most chagrined that the court made its decision without benefit of the facts presented in the affidavit. That McGarvey's affidavit and the district court's decision crossed in the mails was unfortunate; it was *not*, contrary to Merck's accusations, the result of bad faith conduct by McGarvey.

As for Merck's suggestion that the facts attested to in the affidavit are not true, McGarvey can only respond that he has sworn under the oath that the facts contained therein are true, and he stands by them. Merck protests that it never had an opportunity to test the veracity of these facts, allegedly as a result of McGarvey's deviousness. As noted previously, these facts were presented in an affidavit because no hearing was held by the court. McGarvey simply

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9. See Petition, p. 10.

did not submit his affidavit in order to thwart any attempt by Merck to contest the facts presented therein.[10]

B. There Are Compelling Equitable Grounds for Vacating the District Court's Dismissal of the Complaint.

The court of appeals relied upon various "equitable reasons" and "special circumstances" in vacating the district court's dismissal of McGarvey's complaint. The court noted that the instant case came up on appeal ". . . in a posture virtually identical to that of *Goger, supra.*"[11] An examination of the court's rationale in *Goger* reveals the "equitable reasons" the court had in mind in the instant case.

In *Goger,* the plaintiff did not complain of the alleged age discrimination visited upon her to the Division of Civil Rights in the Department of Law and Public Safety, the New Jersey state agency authorized to enforce the New Jersey statute prohibiting age discrimination in employment. The defendant moved to dismiss the plaintiff's district court complaint on the same basis argued by Merck below: that § 633(b) requires a plaintiff to resort to the available state remedies for age discrimination in employment as a prerequisite for bringing a federal suit. The plaintiff contested this interpretation, as did McGarvey in the instant case, but argued alternatively that the district court should retain jurisdiction while allowing the plaintiff sufficient time to seek redress through the appropriate New Jersey state agency. The plaintiff relied upon the United States Supreme Court's decision in *Crosslin v. Mountain States Telephone Co.,* 400 U. S. 1004 (1971).

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10. It should be pointed out that Merck at no time after the district court decision ever requested a hearing before the district court in order to examine McGarvey concerning the facts presented in the affidavit.

11. See Petitioner's Appendix, p. A3.

The district court reviewed the facts in the *Crosslin* case and noted particularly that plaintiff Crosslin never commenced proceedings in the appropriate state agency prior to filing discrimination charges with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 because the EEOC advised her that the state agency in question did not have jurisdiction over her case. The district court distinguished the facts in *Goger* from those in *Crosslin:*

> [p]etitioner [in Crosslin] was confronted with a rather complex question . . . [and her] reliance on the opinion of the EEOC was justified, despite the fact that their view subsequently proved erroneous. [In addition] [p]etitioner, as a layman, did everything which may be reasonably expected of her to comply with the procedural intricacies of Title VII.
>
> Those factors are not present in the case before us . . . The opinion of the Secretary of Labor to the effect that the plaintiff was free to commence her action was so obviously contrary to the express and readily comprehensible language of the Act that plaintiff's reliance on that view must be deemed to be without justification. Further, and in line with the above, plaintiff was represented by counsel during the period in which it would have been proper to commence proceedings under state law.
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> — F. Supp. at —, 5 FEP Cases at 698.

The district court found the *Crosslin* rationale inapplicable, and dismissed Goger's complaint.

On appeal, the U. S. Court of Appeals for the Third Circuit agreed with the district court that § 633(b) required

a potential plaintiff to resort to the appropriate state agency prior to the commencement of a suit in federal district court. Nevertheless, the court of appeals vacated the district court's dismissal of the complaint with the comment that ". . . we . . . consider equitable relief to be appropriate in view of the total absence, to our knowledge, of any judicial decision construing Section 633(b) during the period involved here and in view of the remedial purpose of the 1967 Act.", citing *Love v. Pullman,* 404 U. S. 522 (1972), *Sanchez v. Standard Brands, Inc.,* 431 F. 2d 455 (5th Cir. 1970), *Choate v. Caterpillar Tractor Co.,* 402 F. 2d 357 (7th Cir. 1968), and *Crosslin v. Mountain States Telephone Co., supra.*[11]

As the court of appeals noted in its opinion, the instant case was in an almost identical "posture" as *Goger.* Here, as in *Goger,* there was absolutely no case law in existence at the time McGarvey was supposed to have gone to the PHRC construing § 633(b) as requiring a resort to available state remedies as a prerequisite to jurisdiction in federal court. (Indeed, prior to January, 1973, there were no cases construing § 633(b) at all.) Here, as in *Goger* and in *Crosslin, supra,* the plaintiff did not file a complaint with the appropriate state agency because the federal agency (here, the U. S. Department of Labor) assured him that he should not do so. McGarvey, like plaintiff Crosslin, was not represented by counsel during the period when, it is argued, he should have filed a complaint with the state agency. Thus, the same kinds of equitable considerations voiced by the Supreme Court in *Crosslin, supra,* and by the Third Circuit in *Goger, supra,* seem readily applicable to the facts in this case.

There is, however, a significant factual difference between this case, and either *Crosslin* or *Goger,* which the

11. See Petitioner's Appendix, pp. A10-11.

court of appeals noted in its opinion. Unlike plaintiffs Crosslin and Goger, Plaintiff-Respondent McGarvey initially went to the appropriate state agency, the PHRC, and that state agency told him that he should take his complaint to the U. S. Department of Labor because the state had no jurisdiction over his problem. McGarvey submits that this fact further justifies the court of appeals' action in this case.

Merck countered these equitable considerations in the court of appeals by arguing, essentially, that the plaintiff who relies on advice which subsequently is found to be contrary to a court's construction of a statute, does so at his own risk. This argument presupposes that there is no question as to the meaning of the statute. Respondent McGarvey submits that a legitimate question concerning the interpretation of § 633(b) over which reasonable men can and do differ was presented to the court of appeals. While the court of appeals adopted a construction of § 633(b) contrary to the interpretation urged by McGarvey and the U. S. Department of Labor, the court recognized that to suggest that an aggrieved person is not justified in relying on the advice of the federal agency charged with administering a federal statute would be harsh indeed, especially when the statute in question has been the subject of one case decision prior to this case, and no case decisions prior to 1973.[12]

The equitable basis for the court of appeals' action appears even more persuasive in light of the policy the Act seeks to accomplish. The Act, like Title VII of the Civil Rights Act of 1964 upon which Merck relied so heavily in the courts below, reflected a rising national concern over widespread discriminatory practices in American life. The

12. See the court of appeals comment in *Goger*, Petitioner's Appendix, p. A11.

courts have repeatedly recognized, with reference to Title VII, that the statute is to be construed liberally. *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Rogers v. Equal Employment Opportunity Commission*, 454 F. 2d 234 (5th Cir. 1971); *Tipler v. E. I. duPont de Nemours and Co.*, 443 F. 2d 125 (6th Cir. 1971); *Love v. Pullman Co.*, 404 U. S. 522 (1972). This general principle of liberal interpretation has been particularly emphasized when procedural questions arise under Title VII. *Love v. Pullman, supra; Crosslin v. Mountain States Telephone Co., supra; Sanchez v. Standard Brands Co., supra.*

The rationale of these Title VII cases is readily applicable to the instant case. The Act is a remedial statute with humanitarian objectives similar to those of Title VII, and it should be construed liberally, particularly with respect to procedural technicalities. The court of appeals apparently had this policy in mind in vacating the district court's order, and McGarvey submits that the court acted properly and equitably. As Judge Goldberg noted in *Sanchez v. Standard Brands, Inc., supra:*

> . . . Chief Judge Brown of this circuit has characterized the encounter between a Title VII complainant and "a huge industrial employer" as a "modern day David and Goliath confrontation." . . . In such a confrontation, surely Goliath should not be allowed to fell David with the help of a club fashioned from forms and legal technicalities. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy. (citations omitted) 431 F. 2d at 467

McGarvey submits that the court of appeals' decision has preserved an opportunity for the merits of the complaint

to be resolved, and has served the ends of equity and justice.

C. The Court of Appeals' Remedy Is Limited and Fair.

Merck complains that the specific remedy ordered by the court of appeals does such violence to the usual course of judicial proceedings that this court should exercise its powers of supervision over the lower court and correct its mistake. Merck particularly objects that the court of appeals' order means that "McGarvey *will* necessarily 'end up . . . in the very forum denied him' and very promptly, for the simple reason that under Pennsylvania law his right to file a complaint with the Pennsylvania Commission expired February 11, 1971."[13]

The court of appeals' order, initially, vacated the district court's dismissal and remanded the complaint to the district court with directions that it be stayed to allow McGarvey to ". . . present facts and legal contentions before the Pennsylvania Human Relations Commission regarding the possibility of a waiver or estoppel with respect to the statute of limitations."[14] Merck argues that this part of the order is pointless because the statute of limitations on the state remedy has lapsed, and McGarvey is foreclosed from obtaining relief before the PHRC.[15] This argument presumes a "fact" that simply has not been established. It is by no means a foregone conclusion on the instant facts that the PHRC's advice to McGarvey does not constitute a waiver of the statute of limitations, or alternatively, that this advice does not stop the PHRC from invoking the statute of limitations now. Indeed, because of this petition, McGarvey has been unable to proceed

13. See Petition, p. 9.
14. See Petitioner's Appendix, p. A3.
15. See Petition, p. 12, n. 20.

before the PHRC to investigate the issue.[16] Thus, McGarvey is not automatically returned to the federal forum that would otherwise be denied to him, as Merck argues. Rather, the court of appeals has provided the PHRC the chance to act in light of the court's construction of § 633(b).

The second part of the court of appeals order provides that *if* the PHRC bars McGarvey's complaint, the district court should entertain the complaint. In effect, the court of appeals has directed the district court to treat this *second* resort to the PHRC by McGarvey as sufficient to fulfill the jurisdictional requirement the court has derived from § 633(b).[17] Merck complains that this part of the order is inappropriate, and that at the most, the court of appeals should order a hearing on the facts contained in McGarvey's affidavit.

McGarvey submits that the court of appeals' order accomplishes the equitably and just result based upon the facts. As has been pointed out *infra*, McGarvey ended up in the federal forum through no fault of his own, but rather on the advice of every government authority he could reasonably expect to direct him to the proper forum for his complaint. As the court of appeals recognized, it would be extremely harsh to leave McGarvey remediless, and the merits of his complaint unheard, as a result of the

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16. In passing, McGarvey would respond to Merck's comment at p. 12, n. 19 of the petition that McGarvey has been "free" to approach the PHRC "at all times," by noting that (1) McGarvey was not, until the *Goger* decision, even arguably required to approach the PHRC, and (2) that McGarvey has *already* approached the PHRC once, and been directed elsewhere. Merck's suggestion that McGarvey should repeatedly approach the PHRC, apparently to see if that agency had altered its position, is not reasonable.

17. The statute as construed by both the district court and the court of appeals requires only that the aggrieved individual "seek redress" from the appropriate state agency. Rejection of any such application by the state agency should fulfill the requirement.

mistaken, if good faith, advice of those government agencies. The court of appeals' decision avoids this result, and permits the merits of McGarvey's complaint to be heard. The result is a fair one, and provides absolutely no grounds for the granting of a writ of certiorari.

III.

The Court Should Grant Certiorari, if at All, Only on the Question of the Proper Construction of § 633(b).

If there is any issue presented by the facts of this case which fulfills Rule 19(1)'s test of "special and important" reasons justifying review by this Court, it is the issue of the proper construction of § 633(b). As noted in Section I of the Argument, *infra*, § 633(b) presents a novel question of statutory construction which has been examined in only two courts of appeals' decisions, both in the Third Circuit.[18] The construction of the statute applied by the court of appeals in these two decisions is contrary to the interpretation sought by the U. S. Department of Labor, the federal agency charged with enforcing the Act. The court of appeals was divided in deciding these cases. Circuit Judge Leonard Garth arguing persuasively in dissent that § 633(b) contemplates the procedure to be followed *if* an aggrieved person chooses to pursue his state remedies, rather than *requiring* the aggrieved person to resort to his state remedies before suit may be filed under the federal act.

Respondent McGarvey submits that the only question that might possibly warrant review by this Court is the question of the interpretation of § 633(b).

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18. *Goger v. H. K. Porter Co., Inc., supra*, and the instant case.

CONCLUSION.

For all the reasons herein, Plaintiff-Respondent Paul J. McGarvey respectfully requests that this Court deny Merck's Petition for a writ of certiorari.

Respectfully submitted,

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